No. 92-519 (17)

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In The Supreme Court Of The United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, et al.
Appellants,

v.

MIGUEL DE GRANDY, et al.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

APPELLEES' BRIEF

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QUESTIONS PRESENTED

Upon a trial under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the three-judge district court imposed a remedial districting plan for the Florida House of Representatives. The questions presented are:

1. Whether, after fully reviewing evidence pertaining to the Gingles preconditions and the "totality of the circumstances," the district court's findings were "clearly erroneous" in rejecting the House Appellants' per se defense of proportionality their and unorthodox evidence regarding citizen voting age population.

2. Whether the De Grandy Appellees established illegal vote dilution when they propounded additional minority districts in which the Gingles preconditions were present and the totality of the circumstances evinced a persistent history of invidious discrimination.

3. Whether the abstention doctrine bars Appellees from asserting claims under the Voting Rights Act when no state court action was pending and no state court has ever adjudicated those claims.

4. Whether the district court erred in imposing a remedial plan when the 1992 election was imminent and the state had offered two plans that failed to remedy proven dilution of the Hispanic vote in south Florida.

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**On Appeal From The United States District Court
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APPELLEES' BRIEF

OPINIONS BELOW

The July 2, 1992, judgment and July 17, 1992, opinion of the three-judge court for the Northern District of Florida, Tallahassee Division, which implemented redistricting of the state legislative districts in Florida, are unreported. Each is set out in the Appendix to the De Grandy Jurisdictional Statement (App. 1-92). The May 29, 1992, opinion of the district court apportioning congressional districts for the State of Florida is reported at 794 F. Supp. 1076.

STATEMENT OF THE CASE

Contrary to the assertions of the House Appellants,[1] the district court properly applied the vote dilution analysis established by this Court in Thornburg v. Gingles, 478 U.S. 30 (1986). First, it analyzed the facts relating to the three Gingles preconditions to a prima facie case. Then, it reviewed extensive testimony concerning voting history, minority group representation, discrimination against Hispanics, the lingering effects of disparate socioeconomic circumstances and other factors relevant to "totality of the circumstances." Based upon this complete analysis, the court found Hispanic vote dilution in clear violation of the Voting Rights Act and, with the 1992 elections imminent, imposed a remedial plan for the Florida House of Representatives.

The House Appellants do not challenge the lower court's findings regarding Hispanic group cohesiveness or racially polarized voting -- two of the three threshold Gingles factors that lead to Section 2 liability.[2] Instead,

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[1] The legislative and executive officials of the state of Florida who appeal the district court's judgment with respect to the Florida House of Representatives in No. 92-519 are collectively referred to herein as the "House Appellants."

[2] Indeed, in their amicus brief in Shaw v. Reno, they affirmatively relied on these findings:

> [T]he findings . . . in Wetherell v. De Grandy demonstrate that the State of Florida did have a compelling interest in considering minority interests because Dade County is characterized by racially polarized voting and Hispanic citizens are politically cohesive.

(continued...)

they question the lower court's finding that the admittedly cohesive Hispanic population in south Florida is sufficiently large and geographically compact to constitute an effective voting majority in eleven state House districts, rather than in only nine districts as established by the challenged state plan.

Additionally, the House Appellants seek to avoid the consequences of the lower court's Section 2 liability findings by arguing (1) that a "proportional" allocation of House seats (based on voting age population but limited to the Hispanics in Dade County) provides a per se defense to a Section 2 case; (2) that there were procedural defects in the remedial phase of the hearing; and (3) that the De Grandy Appellees'[3] federal rights were adjudicated in a state forum that expressly disclaimed any such holding. Because these arguments lack merit, and because the House Appellants have identified no "clearly erroneous" findings,[4] the decision of the lower court should be affirmed with respect to the Florida House of Representatives, and the lower court's remedial order apportioning the Florida

---

[2](...continued)
Brief of Bolley Johnson, Speaker of the Florida House of Representatives and Peter A. Wallace, Chairman of the Reapportionment Committee of the Florida House of Representatives, Amici Curiae in Shaw v. Reno, No. 92-357 (appeal pending) (1992).

[3] Miguel De Grandy and the other plaintiffs in De Grandy v. Wetherell, who are the appellees in No. 92-519 are collectively referred to herein as the "De Grandy Appellees" or "Appellees."

[4] In Gingles, this Court "reaffirm[ed] our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." 478 U.S. at 79.

House in compliance with the Voting Rights Act should be implemented.[5]

A. Background.

In a special legislative session on April 10, 1992, after a three-judge federal panel had assumed jurisdiction of the De Grandy Appellees' Equal Protection and Voting Rights Act claims, the Florida legislature passed Senate Joint Resolution 2-G ("SJR 2-G" or "the state plan"), which reapportioned the Florida Senate and House of Representatives on the basis of the 1990 census. The results of the census demonstrated tremendous demographic changes and a statewide population increase of more than three million persons. The state plan established nine House and three Senate districts in the Dade County area, and packed into each Hispanic voting age population supermajorities of 69 percent or higher. In passing the state plan, the legislature rejected alternative plans that had been proposed for south Florida and that would have provided the Hispanic community there with an opportunity to elect eleven state House members and four state Senators of their choice.

After a trial on the merits, the district court agreed with the De Grandy Appellees that the state plan impermissibly diluted Hispanic voting strength with regard to the state House.[6] Hispanics in the State of Florida comprise

[5] This Court entered orders staying the lower court judgment pending appellate consideration. See Stay Orders in No. A-32 and No. A-51.

[6] The district court also found that the state plan for state Senate districts in the Dade County area violated Section 2 of the Voting Rights Act but failed to order a remedy. That error is the subject of the De Grandy appeal in No. 92-593.

12.17 percent of the population of the state and 11.73 percent of the state's voting age population. If Hispanics were represented in proportion to their percentage of the population, they would hold 14 House seats, but, in the 1992 elections held under the state plan, Hispanics elected representatives to only ten, or 8.25 percent, of the state House seats.

B. The Federal Lawsuit.

On January 13, 1992, the De Grandy Appellees filed suit in the United States District Court for the Northern District of Florida, alleging that existing congressional and state legislative districts violated Section 2[7] and that the Florida legislature would not pass a legislative reapportionment[8] plan meeting all constitutional and statutory requirements sufficiently in advance of scheduled elections to afford the De Grandy Appellees the opportunity to mount effective campaigns and to participate equally in the 1992 elections. Accordingly, the De Grandy Appellees requested that the federal court accept jurisdiction, establish a scheduling order and, thereafter, if necessary, prepare congressional and state legislative plans of apportionment that would become effective in June 1992, prior to the

[7] In contrast to House Appellants' assertions (see House Appellants' Brief at 9), the De Grandy Appellees' complaint alleged violations of Section 2 from the outset. App. 9. ("App." references are made to the Appendix to the De Grandy Jurisdictional Statement in No. 92-593.)

[8] Although "reapportionment" technically refers to the process of distributing seats in the United States House of Representatives among the several states, the Florida Constitution uses the word "apportionment" to describe its process of determining the number of legislative seats and establishing district lines. The court below used the term "reapportionment" to describe both the state's process and the establishment of district lines for congressional districts. This Brief adopts the terminology of the court below.

scheduled period of qualifying for the impending election.

The De Grandy Appellees did not request the federal court to enjoin the state legislature's effort to pass apportionment plans. Rather, Appellees suggested that the three-judge panel permit the legislature to proceed while the court itself was simultaneously developing redistricting plans, to guard against the event that the legislative process would not produce acceptable plans sufficiently in advance of qualifying for the 1992 elections. The federal court, however, dismissed the De Grandy Appellees' original complaint without prejudice, deferring to the state's legislative process and the state's assertions that congressional and legislative plans would be adopted and in place well in advance of the qualifying deadline.

Despite this immediate time constraint, however, the regular session of the state legislature ended in March 1992, without passage of any apportionment plan. As a result, the legislature was deadlocked, and the De Grandy Appellees filed their second amended complaint, renewing the request that the federal court take jurisdiction to ensure that some apportionment plan, whether legislative or court-ordered, be in place in advance of qualifying for the 1992 elections.[9] The court denied the House Appellants' renewed motions to dismiss, accepted jurisdiction, and established a scheduling order whereby congressional and legislative plans would be submitted by May 29, 1992. In entering the scheduling order, the three-judge district court announced that it was not enjoining any state proceedings or any effort by the state legislature to adopt apportionment plans. App. 12.

[9] The second amended complaint also contained claims under both Section 2 and the Fourteenth Amendment. App. 9. See n.7, supra.

Two weeks after acceptance of jurisdiction by the federal court, the Florida legislature passed SJR 2-G reapportioning the state House of Representatives and state Senate. No congressional plan was passed. The federal court immediately delayed trial on state apportionment but maintained its schedule with respect to congressional redistricting.

C. State Supreme Court Review Of The Joint Resolution.

Florida's Constitution establishes a unique, quasi-legislative role for its supreme court in the reapportionment process. The state legislature is directed to reapportion Florida's congressional delegation and the state House of Representatives and Senate (based upon the decennial census), and establishes a process to achieve that result.[10] Fla. Const. art. III, § 16. If the legislature fails to pass a joint resolution of state legislative apportionment in regular session, it must meet in special session. If the legislature fails to pass a plan in special session, the Florida Supreme Court must assume a legislative role and adopt its own plan. Fla. Const. art. III, § 16(f).

Should the legislature pass a joint resolution of apportionment, the enactment process requires the joint resolution to be submitted to the Florida Supreme Court for a special 30-day review. This 30-day review is designated as a "declaration" and is nothing more than a review of the resolution "on its face." In re Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1972). Although the

[10] The Florida legislature failed to adopt a plan for congressional reapportionment, forcing the federal court to devise a plan that was adopted and implemented for the 1992 elections. The court-imposed congressional plan was not appealed. See De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992).

House Appellants now characterize the proceeding as a "full evidentiary hearing" (House Appellants' Brief at 44), in fact, no evidence was taken, no cross-examination was permitted and the merits were decided solely on the basis of briefs and oral argument. The court did not resolve issues of disputed fact or make factual findings.[11]

Once the court has conducted its facial review and held the plan valid, it becomes effective under state law, subject only to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) and 28 C.F.R. § 51.1, et seq. In prior reapportionment cases, the Florida Supreme Court has established that challenges to an apportionment plan under Section 2 of the Voting Rights Act are to be conducted in separate trial proceedings. In re Senate Joint Resolution No. 1305, 263 So. 2d 797 (Fla. 1972).

During the state supreme court review of the state plan involved in this case, both houses of the legislature argued that the Florida Supreme Court could not determine whether the state plan complied with Section 2 of the Voting Rights Act:

> This Court's instant review cannot be dispositive of the ultimate Section 2 determination. Section 2 requires an "intensely local appraisal of the design and impact mechanism" and a "flexible, fact-intensive inquiry into the past and present reality of the political process" . . . an inquiry beyond the scope of this Court's Article III, Section 16 review.

[11] Unlike all other Florida laws, reapportionment is not subject to a gubernatorial veto, a limitation which is consistent with the quasi-legislative role of the state supreme court in connection with apportionment. See Fla. Const. art. III, § 16.

Joint Brief of the Legislature at 17. The Florida Attorney General took the same position:

> A Section 2 challenge requires a detailed, complex factual inquiry into the underlying application of the redistricting plan. The question of whether the political processes are equally open depends on a searching and practical evaluation of the past and present reality and on a functional view of the political process. This determination is peculiarly dependent upon the facts of such case. . . . A Section 2 claim for the purposes of this Court's jurisdiction is not a facial constitutional claim; therefore, any Section 2 implication is not properly before this Court in this proceeding.

Brief of the Attorney General at 25.

In contrast, the De Grandy Appellees urged the Florida Supreme Court to conduct a complete trial -- with testimony under oath and subject to cross examination -- to determine whether the Joint Resolution violated Section 2. De Grandy Appellees also asserted that any attempt to determine the plan's compliance with the Voting Rights Act without evidentiary proceedings would be unconstitutional. State Brief of De Grandy at 9.

The Florida Supreme Court, however, agreed with the state officials and rejected the De Grandy Appellees' request for an adjudication of their Section 2 claims, holding:

> [I]t is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in

> Thornburg v. Gingles, within the time constraints of Article III, Section 16(c).

In re Senate Joint Resolution 2G, 597 So. 2d 276, 282 (Fla. 1992). Because necessary fact-finding and factual analysis were impossible, the court held that a Section 2 challenge would have to come at a later time:

> Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation . . . .

Id. at 282.[12]

Thus, the Florida Constitution assigns to the Florida Supreme Court a quasi-legislative role in the reapportionment process. The court's summary conclusion that the Joint Resolution did not discriminate against minorities was expressly qualified by "the limitations of [its] review, including both time constraints and the unavailability of specific factual findings. . . ." Id. at 285. Accordingly, the court entered its decision without prejudice to a future Section 2 challenge:

[12] In his dissent, Chief Justice Shaw agreed with that portion of the majority opinion which determined that the Florida Supreme Court could not conduct a Section 2 analysis in the facial review proceeding:

> [T]his Court cannot in the present proceeding conduct the kind of fact-intensive analysis required in a direct challenge to an existing plan under the Voting Rights Act . . . .

Id. at 289.

> We acknowledge that any interested person should have the opportunity to attempt to prove that the Joint Resolution is invalid through a presentation of evidence in accordance with the Gingles analysis of the Voting Rights Act. Therefore, our holding is without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act.

Id. at 285-86. Thus, the House Appellants' assertion that the De Grandy Appellees "obtained the ruling they requested" in the Florida Supreme Court, House Appellants' Brief at 44, is without support in the record.

D. Section 5 Review.

On May 13, 1992, the Florida Supreme Court issued its initial order approving SJR 2-G, In re Senate Joint Resolution 2G, 597 So. 2d 276 (Fla. 1992), which was then submitted to the Justice Department for Section 5 review. On June 16, 1992, the Attorney General of the United States interposed an objection to the state plan with regard to state Senate districts in Hillsborough County.[13,14] App. 14. As a result, the Florida Supreme

[13] Dade County is not subject to Section 5 of the Voting Rights Act. Only five Florida counties are covered by the Section 5 preclearance requirements: Collier, Hardee, Hendry, Hillsborough, and Monroe. 28 C.F.R. 51, App.

[14] Despite the Florida Supreme Court's "facial review" of SJR 2-G and its determination that the plan "does not discriminate against minorities," the Department of Justice refused to preclear Florida's Senate plan under Section 5 of the Voting Rights Act, because the State of Florida could not prove that its reapportionment plan was free of

(continued...)

Court returned the ineffective state plan to the legislature with an order "encouraging the Legislature to adopt a plan that would meet the objection of the Justice Department." In re Senate Joint Resolution 2G, 601 So. 2d 543, 544 (Fla. 1992).

Surprisingly, the legislature declined to participate further in the reapportionment process: "We do hereby officially transmit to you our joint determination that we will not convene our respective houses in special session, or expand the scope of the current special session, to include legislative apportionment issues." Letter of the President of the Florida Senate and the Speaker of the Florida House to the Justices of the Florida Supreme Court dated June 18, 1992. App. 109. As a result, on June 25, 1992, the Florida Supreme Court itself modified the state plan to meet the Attorney General's objections to state Senate districts in Hillsborough County. In re Senate Joint Resolution 2G, 601 So. 2d 543 (Fla. 1992).

E. Federal Court Proceedings -- Section 2 Challenges To The Legislative Plan After Preclearance.

On April 6, 1992, pursuant to Fed. R. Civ. P. 53, the federal court had appointed a special master to review or prepare plans for reapportionment. On April 24, 1992, the special master appointed an expert to consider and evaluate the parties' congressional plans and began

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[14](...continued)
discriminatory intent or efect. 42 U.S.C. § 1973(c). Under federal law, Florida's 1990 apportionment was "not effective as law until and unless it is precleared." McCain v. Lybrand, 465 U.S. 236, 245 (1984).

hearings on them.[15] The evidence adduced at the hearings on congressional redistricting was extensive and largely concerned the Section 2 evidentiary issues involved in the "totality of the circumstances" test, specifically including south Florida.[16] Thus, even before the Florida Supreme Court entered its final decision on June 25, 1992, the federal court had before it all of the facts pertinent to a review of the parties' proposed plans or, if necessary, to prepare court-drawn congressional and state legislative apportionment plans.

On June 24, 1992, the Department of Justice filed a separate complaint challenging both the state House and state Senate plans under Section 2 of the Voting Rights Act. That action was consolidated with the third amended De Grandy complaint. On June 26, 1992, the same day that the Florida Supreme Court modified the Senate plan to meet the objections interposed by the Department of Justice and that plan became legally enforceable, the Appellees again moved to amend their complaint to add Section 2 challenges to the amended Senate plan. The court below permitted that amendment as well.

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[15] At this point, the court below had stayed proceedings regarding legislative reapportionment in deference to the legislative process.

[16] For an extensive discussion of the evidentiary basis upon which the special master concluded that minority congressional districts would be necessary, see De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992). The findings of the special master and the court below with regard to the "totality of circumstances" elements in Dade County were subsequently buttressed in Meek v. Metropolitan Dade County, Fla., 805 F. Supp. 958 (S.D. Fla. 1992), and Meek v. Metropolitan Dade County, Fla., 805 F. Supp. 967 (S.D. Fla. 1992). All of these findings were later incorporated by the district court in its consideration of the state plan. App. 64.

F. The Section 2 Trial.

The three-judge court below divided the trial of the Section 2 challenge to the state legislative plan into a liability phase followed by a remedial phase. After five days of trial, the lower court determined that the Appellees had met all three of the Gingles preconditions,[17] as well as the totality of the circumstances test outlined by the concurrence in Gingles, thereby establishing Section 2 liability.[18]

In reaching its decision that the Hispanic community in the Dade County area was sufficiently large to comprise a tenth and an eleventh state House district, the court carefully examined the testimony of numerous experts regarding the percentage of voting age population necessary for Hispanics to have an equal opportunity to elect candidates of their choice. App. 38. The court also examined the available evidence to locate within Dade County the residences of recent immigrants. App. 46. Based on this

[17] The only Gingles precondition challenged by the House Appellants here is whether the De Grandy Appellees proved that the Hispanic population group is sufficiently large to constitute a majority in two additional single-member state House districts. In addition, House Appellants do not contest the lower court's findings with regards to the "totality of the circumstances." See n.2, supra, and accompanying text.

[18] In Solomon v. Liberty County, Florida, 899 F.2d 1012 (11th Cir. 1990) (en banc) (per curiam), cert. denied, 498 U.S. 1023 (1991), the Eleventh Circuit Court of Appeals divided evenly on the issue of whether Section 2 plaintiffs must make a showing beyond the three Gingles factors to establish liability. In the present case, the court below examined the "totality of the circumstances" in addition to the Gingles factors and concluded that, under either analysis, the Appellees had met their burden of establishing liability.

testimony and its own examination of the evidence,[19] the court concluded that, if a 60 percent Hispanic VAP guideline was applied carefully to localized demographic areas, this concentration would compensate for lower citizenship levels, as well as lower voter turnout and registration levels, and would thereby provide an equal opportunity for Hispanic citizens to elect candidates of their choice.[20] App. 84.

SUMMARY OF ARGUMENT

I. The De Grandy Appellees brought this Section 2 action on behalf of the Florida Hispanic community to remedy their historic lack of equal access to the political process in state legislative elections. Political competition in Florida in which the Hispanic community had supported candidates had been marred by campaigns characterized by racial appeals, historic underrepresentation in the state legislature and a severely racially polarized electorate. In this milieu of ethnic hostility, the De Grandy Appellees sought to achieve "fair group representation" for Hispanics in the state legislature.

Faithfully applying the well-recognized Gingles analysis, which this Court recently deemed applicable in the context of single-member districts, the district court found that the De Grandy Appellees had established that the Hispanic community was sufficiently large and geographi-

[19] The evidence adduced at the congressional portion of the trial was adopted by the lower court during its consideration of the House and Senate challenges. See n.16, supra, and accompanying text. See also App. 64.

[20] See also Judge Vinson's concurring opinion criticizing the unreliability of House Appellants' citizenship analysis data. App. 90-91.

cally compact to comprise eleven districts in which it could command a potential voting majority and elect candidates of its choice, rather than the nine Hispanic districts created by the state's plan.

II. The remedial plan adopted by the District Court contains only eleven Hispanic seats out of the 120-member House, less than ten percent of the entire Florida House of Representatives. In the state as a whole, Hispanics constitute 11.73 percent of the voting age population (a proportional allocation, if appropriate, would entitle Hispanics to 14 seats [120 x .1173 = 14.076]). Notwithstanding this lack of proportionality, the House Appellants cast as the central issue in this appeal as "whether as a result of its population size and geographic concentration, an ethnic minority can claim an entitlement under Section 2 of the Voting Rights Act to elect representatives in numbers greater than the minority group's percentage of the population." Even if proportionality afforded a per se defense in a Section 2 case -- a concept vigorously challenged here -- the remedial plan adopted falls well short of any such proportionality.

The district court properly evaluated the "effectiveness" of the De Grandy Appellees' proposed plan. By considering varying levels of voter registration, voter turnout, voting age population, election results, and citizenship, it concluded that the state's plan violated Section 2. In contrast, the district court found that the eleven districts proposed by the De Grandy Appellees afforded the required "potential" for the Hispanic community to elect representatives of choice and were, therefore, "effective."

The House Appellants continue to maintain the appropriateness of the state plan's creation of nine Hispanic districts "packed" with excessively high Hispanic citizen-

ship levels. Such an allocation of seats would be a departure from the state's policy of dividing legislative districts on the basis of all persons. The Hispanic non-citizens thereby excluded from Hispanic majority districts would necessarily be placed in Anglo districts, resulting in the disparate treatment of those non-citizens and, because only citizens may vote, unfairly weighting the votes of Anglo citizens.

III. Following the five-day trial, which itself was supplemented by earlier testimony in the congressional trial, the district court found Section 2 liability and, with elections imminent, moved immediately to the remedy phase. The House Appellants were afforded an opportunity to offer a remedial plan, in spite of the fact that the Governor and the Florida legislature had previously declined to consider reapportionment legislation further. The House Appellants consecutively presented two remedial plans that the district court found inadequate to cure the Section 2 violations. As a result, the court ordered the De Grandy Appellees' modified plan into effect.

IV. Finally, the House Appellants continue to insist that the district court should not have entertained the De Grandy Appellees' Section 2 claims at all, because the state supreme court -- pursuant to state constitutional mandate -- had declared the state's plan valid on its face, despite the fact that no evidence was presented, no cross-examination was allowed and there were no findings of fact. That argument, however, is premised upon a confrontation between a federal court and a state court that never occurred. The Florida Supreme Court expressly declined to adjudicate any Section 2 claims during the state proceeding. The federal court, therefore, properly undertook that task.

For the reasons stated herein, the judgment of the lower court with respect to the Florida House of Representatives should be affirmed in all respects.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE STATE PLAN IMPROPERLY DILUTED HISPANIC VOTING STRENGTH AND DENIED MEMBERS OF THAT COMMUNITY EQUAL PARTICIPATION IN THE ELECTORAL PROCESS AND THE OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE.

A. In Establishing Liability, The District Court Faithfully Applied This Court's Standards For Determining Vote Dilution.

A Section 2 violation is established if plaintiffs can show that "the political process leading to nomination or election in the state are not equally open to participation by a class of citizens protected [by the Act] in that its members have less opportunity to participate in the electoral process and elect representatives of their choice." 42 U.S.C. § 1973(b). In Thornburg v. Gingles, 478 U.S. 30 (1986), a vote dilution case challenging multi-member districts, this Court defined the order and method of proving whether members of a protected class have "less opportunity to participate in the electoral process."[21] The

[21] In Gingles, this Court announced three preconditions by which minority plaintiffs establish a prima facie case of unequal opportunity to participate in the political process. These preconditions require that the minority must be able to demonstrate:

(continued...)

true thrust of House Appellants' position in this case is that the Gingles precondition analysis does not apply to a case challenging single-member districts. House Appellants' Brief at 23-24. In fact, however, this Court's recent unanimous opinions in Voinovich v. Quilter, ___ U.S. ___, 113 S. Ct. 1149, 1157 (1993) and Growe v. Emison, ___ U.S. ___, 113 S. Ct. 1075, 1084 (1993), held that "the Gingles preconditions apply in challenges to single-member districts as well as multimember districts."

Here the court below found that: Hispanics are sufficiently large and geographically compact to form a majority in two more districts than were created in the state's plan, App. 36-53[22]; Hispanics are politically cohesive, App. 53-58, and non-Hispanics usually vote sufficiently as a bloc to defeat the Hispanic community's choice except when the candidate of choice runs in a district in which Hispanics are a voting majority, App. at 59-64.

[21](...continued)

1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate running unopposed -- usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 49-50.

[22] As Justice Brennan explained in Gingles: "Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50, n.17 (emphasis in origina.,.

In particular, the district court found that the De Grandy Appellees had met the Gingles threshold test by introducing an alternative districting plan in which the Hispanic population by its proxy, the Hispanic voting age population -- comprised appropriate and effective majorities in eleven single-member districts in Dade County. App. 82-83. Based upon reconstituted results of numerous previous Anglo-Hispanic elections in the precincts which comprised the eleven illustrative districts, the court also found these districts to be effective in that the Hispanic community's candidate of choice would have prevailed had the districts been in effect. See Testimony of Dr. Allan J. Lichtman, Tr. III, 24.

In further examining the State of Florida and Dade County, the court found that the lingering effects of social and economic discrimination "profoundly divided" Hispanic and Anglo racial groups, App. 61, and specifically found the existence of continuing discrimination against Hispanics. App. 64-65. Thus, the court completed its finding of ultimate vote dilution based not only upon the Gingles factors but also upon language-based discrimination and the lingering effects of social, economic and political discrimination in the state of Florida. App. 64-67. In fact, Dr. Dario V. Moreno testified that SJR 2-G "is designed to elect non-Hispanic whites by exploiting ethnic tensions and polarizing voting patterns in Dade." J.A. 195. As a result, the district court properly determined that the state plan impermissibly denied the Hispanic community an equal opportunity to participate in the electoral process. App. 66-67. These findings of ultimate vote dilution are binding on appellate courts unless clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564 (1985).

Voinovich recently affirmed this very method of determining whether minority voters possess the potential to elect additional representatives of choice. That case

involved a challenge to the single-member legislative reapportionment scheme in the state of Ohio on the grounds that it unnecessarily overconcentrated, or "packed," African-Americans into majority districts, which limited their voting potential or influence in surrounding legislative districts. Although this Court could not find that a protected class had been denied equal opportunity in that case, that result obtained only because the Ohio plaintiffs could not point to additional single-member districts in which they had the potential to comprise a majority, not because the Gingles analysis was inappropriate to apply in the single-member district context.

Such was not the case here. While the De Grandy Appellees' fracturing claim is conceptually similar to that of the Voinovich plaintiffs (in that both involve vote dilution challenges to single-member districting plans), unlike Voinovich, in this case the De Grandy Appellees offered an alternative plan which created two additional districts in which the Hispanic minority would have the effective ability to elect candidates of its choice. App. 87. This potential to elect additional candidates of choice, when combined with the clear demonstration of a "totality of circumstances" of invidious discrimination, conclusively demonstrates that the De Grandy Appellees' rights to equal participation and equal opportunity were impaired by the state plan.

B. Appellants' Proportional Representation Defense Is Not Supported By Section 2, By This Court's Decisions Or By The Facts Of This Case.

1. The District Court's Finding Of Vote Dilution Negated Any Defense Of Proportional Representation Or Maximization.

In amending Section 2, Congress did not directly address the measurement of "how many" districts a minority group should have to achieve "equal opportunity." The language of Section 2, standing alone, only mandates that the district court engage in a fact-intensive examination of a challenged districting plan and determine, based on the "totality of circumstances", whether a violation has occurred. This statutory test grants to district courts wide discretion in evaluating vote dilution claims. To channel this discretion, this Court adopted the three Gingles preconditions, which effectively restrict the application of Section 2 to circumstances in which a minority group's "fair group representation" has actually been impaired. See Davis v. Bandemer, 478 U.S. 109, 125 n.9 (1986).

Even if proportionality had been achieved in this case, which it has not, the language of the statute with regard to proportionality does not create a irrefutable presumption for either plaintiffs or defendants. With regard to plaintiffs, Section 2 cautions that "nothing in this Section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." This proviso is a limitation on a plaintiff's ability to make out a prima facie case and prevents race-based districting without additional proof of "unequal opportunity" in the election process. With regard to

defendants, Section 2 provides that "the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." (Emphasis added.) Because proportionality is, thus, but one of the factual circumstances, the trial court's finding in that regard is binding unless clearly erroneous.

Indeed, Justice Brennan, discussing the effect of this proviso, analyzed the legislative history of this part of the statute and concluded that "proof that some minority candidates have been elected does not foreclose a Section 2 claim." 478 U.S. at 75. See also Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992). As Judge Easterbrook wrote for the Baird court:

> We agree . . . that proportional representation does not automatically defeat claims under the Voting Rights Act -- not only because Justice Brennan's opinion says so, 478 U.S. at 74-76 . . . , but also because the statute gives to each person the right to political participation. . . . A balanced bottom line does not foreclose proof of discrimination along the way. Connecticut v. Teal, 457 U.S. 440 . . . . Just as the proviso . . . ensures that white candidates are free to compete for electoral success that exceeds the ratio of white voters, so blacks must be free to compete for favor; the Voting Rights Act neither sets nor tolerates a cap on their achievements.

Id. (emphasis added).

Justice O'Connor's concurring opinion in Gingles illustrates that this Court clearly understood the conse-

quences that the adoption of this measurement of equal opportunity has for district courts reviewing reapportion-
.. plans.

> The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength.

478 U.S. at 91. What might have been controversial in Gingles is now settled law. Because this Court unanimously applied the Gingles test as a threshold requirement in Voinovich and did not limit that approach by any consideration of proportionality as a per se defense, that case stands as an effective prediction of the proper disposition of that issue when it is appropriately presented.

Thus, the House Appellants' reliance upon the result of this Court's analysis of District 23 in Gingles is entirely misplaced. This Court's holding with regard to District 23 is only that the plaintiffs there, like the plaintiffs in Voinovich, were unable to prove that an additional majority/minority district could be created in excess of the number of blacks who had historically been consistently elected. "This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." 487 U.S. 77. As Justice Brennan specifically warned, however, "[i]n some situations, it may be possible for Section 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives. . . ." Id. In the instant case, not only was there no history of "sustained [Hispanic] success," but also there was unrebutted proof that the Hispanic minority's undiluted voting strength exceeded that provided for it by the state plan.

The House Appellants further rely upon Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992), aff'd sub nom. African-American Voting Rights Legal Defense Fund, Inc. v. Blunt, 61 U.S.L.W. 3682 (April 5, 1993), to support their proportionality defense. That case arose in a factual setting clearly distinguishable from the case at bar.[23] Unlike the historical experience in Florida, the Nash court found evidence of a history of proportional representation, as well as a near certain likelihood that there would be such representation in the future. In this case, the undisputed proof is that the 1992 elections confirmed, and the experts' predict that future election results in Florida will confirm, underrepresentation of the Hispanic community because of the illegal "packing" achieved by the state plan.

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[23] The De Grandy Appellees recognize that this Court summarily affirmed Nash. As was observed in Davis v. Bandemer, however, summary affirmances are not binding on this Court in a subsequent plenary consideration of another case. 478 U.S. 109 at 121.

Put another way, the effect of the Gingles standard, properly applied, is illustrated by a mathematical application of the concept of proportionality to the facts in this case. True proportionality would entitle Hispanics to 14 seats in the Florida House.[24] The creation of eleven Hispanic seats in the plan adopted by the court neither grants Hispanics proportional representation nor maximizes their voting strength. Because, as a factual matter, neither the state's plan nor the district court's remedy achieves proportionality, this Court does not need address to address whether, under a proper factual setting, a proportionality defense exists to a Section 2 claim.

2. The State As A Whole Is The Correct Geographic Area In Which A Court Should Measure Vote Dilution.

House Appellants argue that proportional representation of Hispanics in Dade County defeats a Section 2 challenge to the state House apportionment scheme for the entire state of Florida. Even if the Court were to accept proportionality as a per se defense, which the Appellees do not believe it should, such a defense must be examined on the basis of the statewide plan. The De Grandy Appellees have consistently contended that the House districts for the entire state established by the state plan deprived Hispanics of an equal opportunity to elect candidates of their choice.

For example, paragraph 133 of the fourth amended complaint alleged that the

[24] Because Florida Hispanics comprise 11.73 percent of the statewide voting age population, under a strictly proportional system, they would be entitled to 14 of the 120 House seats.

> ethnic population concentrations of the State of Florida are such that, if the state is divided into equally populated districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, there exists, as a minimum . . . eleven districts which would contain a majority of Hispanic voting age population. These are also politically cohesive and reasonably compact districts.

J.A. 67. That all eleven of these districts are found in the Dade County area does not establish that the De Grandy Appellees were not challenging the entire discriminatory state plan. When counsel stated on the record that the evidence of vote dilution would be presented only with regard to Dade County, they were not abandoning the challenge to the statewide plan. Indeed, the De Grandy Appellees' proof was necessarily limited to the south Florida area where compact Hispanic majority districts could be created. The House Appellants much-vaunted record statements are nothing more than a confirmation of the De Grandy Appellees' consistent contention -- Hispanics in the Dade County area have been submerged by limiting their election of representatives of choice.[25]

The notion that a federal court should use a local political subdivision to measure voting power in a statewide

[25] African-American plaintiffs may have been able to show majority/minority districts in certain other areas of the state where claims were originally alleged. Their abandonment of these claims has no impact on the simple fact that the De Grandy Appellees never strayed from their original contentions that Hispanic vote dilution existed in the State of Florida as a result of the "packing" of Hispanics into nine (rather than eleven properly constituted districts) in the Dade County area.

legislative body that uses single-member districts has been discarded since Gray v. Sanders, 372 U.S. 368 (1963). Proportionality, when it is considered as a part of the totality of the circumstances, should be measured on the basis of the entire population of the governmental unit in question. As City of Richmond v. United States, 422 U.S. 358 (1975), illustrates, proportionality for a municipality is measured on the basis of the population of the area served by that government. Likewise, Baird undertook a proportionality analysis based on the entire jurisdiction challenged, not a lesser political subdivision. See also Jeffers v. Clinton, 730 F. Supp. 196 (1989), aff'd, 498 U.S. 1019 (1991) (measuring vote dilution in a statewide legislative plan on the basis of total statewide population).[26]

If a legislature can selectively pick the subdivision it chooses to measure proportionality, it can guarantee that no dilution claim can ever be proven. If just one member of the minority group has historically been elected (or his election can reasonably be predicted), the state could thereby define an area in its plan in which proportionality

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[26] As the Jeffers court found:

> For the foreseeable future, the present location of legislative districts lines will make it very difficult to elect more than six black legislators, out of a total in both houses of 135 members. And this is so even though black people make up about 16 percent of the total population of the State of Arkansas.
>
> In this situation, black citizens have less opportunity than other members of the electorate to elect representatives of their choice. This is a violation of Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b).

730 F. Supp. at 198.

had been achieved. Such an ultimately malleable standard would leave courts rudderless as to what geographic area to use in evaluating compliance.

The House Appellants provide no persuasive authority for their assertion that a proportionality analysis should be confined to the geographic area where the minority population is sufficiently concentrated to draw majority/minority districts. By citing Brown v. Thomson, 462 U.S. 835 (1983), for the proposition that the focus of the inquiry must be on Dade County alone, the House Appellants ignore both the legal and factual distinctions of that case. Brown was not a Section 2 case; it concerned an equal protection claim that specifically alleged only that one county in the state of Wyoming was overrepresented. As a result, this Court noted that, "Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County." Id. at 846. In contrast, here, the De Grandy Appellees and the United States both complained of the dilutive effects of the statewide apportionment scheme embodied in SJR 2-G. J.A. 67, 77. The Appellees' use of evidence of Hispanic vote dilution in "south Florida" to illustrate and prove the flawed nature of SJR 2-G did not convert their statewide dilution claims to claims based on the Dade County area alone.

C. The Court Below Applied The Correct Standard For Measuring Voting Strength Needed To Create Districts Complying With Section 2.

1. Use Of Citizen Voting Age Population Would Lead To Constitutionally Impermissible Results.

When devising new legislative districts,[27] it is elementary that a state must create them in such a way as to ensure that each person's vote is weighted "as nearly equal as practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964). In achieving this requirement, a state may choose, as a matter of its internal policy, a standard method to apply consistently throughout its jurisdiction to create equal population districts. As a result, districts may be comprised of equal numbers of all persons reported by the federal census or, alternatively, this Court has approved the use other criteria, including the number of registered voters (Burns v. Richardson, 384 U.S. 73 (1966)), or citizens (WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964)), so long as the alternative method chosen is an acceptable proxy for achieving districts of roughly equal total population.

The State of Florida chose, as a matter of state policy, to draw its House districts by dividing the total number of all persons in the state into 120 districts of approximately equal total population. The base number used was the total population of the state as reported in the 1990 federal census. This measure includes all persons --

[27] Article III, § 16 of the Florida Constitution requires that Florida's bicameral legislature be reapportioned every ten years on the basis of the federal decennial census and permits a configuration of either single or multi-member districts.

all citizens, all non-citizens, all voters and all non-voters.[28] This policy choice is reflected in the Florida constitution as well as in the actual numerical division of the districts contained in SJR 2-G. See Plaintiffs' Exh. 5 (Report Accompanying SJR 2-G) (Data for Districts), House Appellants' Juris. Statement App. 171a et seq.; see also In re Senate Joint Resolution 2G, 597 So. 2d 276, 278-79 (Fla. 1992).

By pursuing a defense that insists upon structuring districts according to the citizen voting age population ("CVAP") only, the House Appellants have drastically departed from their own state policy and, if successful, would impose an invidiously discriminatory burden upon the Hispanic community of south Florida. This departure from established procedure would itself be evidence of intentional discrimination. Village of Arlington Heights v. Metro Housing Development, 429 U.S. 252, 267 (1977). The resulting Hispanic districts would be "packed" with high citizenship levels in order to achieve the state's criteria. Neighboring Anglo districts would have higher numbers of non-citizens and, correspondingly, a lower number of voters.

Because only citizens can vote, the policy chosen by the State of Florida of including all persons (citizens and non-citizens, voters and non-voters) in equal population districts may well result in there being fewer eligible voters in districts that are populated by significant numbers of

[28] Non-citizens are both counted in the federal census and included in the congressional apportionment base. See Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564, 576-577 (D.D.C. 1980).

non-voters and/or non-citizens.[29] Because representatives elected from those districts represent the people of those districts,[30] such a disparity in the number of eligible voters does not violate the requirements of Reynolds v. Sims.

An essential underpinning of the validity of a redistricting plan is that the method of dividing the state -- the population base chosen by which to establish the requisite number of districts -- must be consistently applied. Swann v. Adams, 385 U.S. 440 (1967). Because the number of citizens in a state is a subset of the state's total population, and because the number of registered voters is, likewise, a subset of the total number of citizens, a redistricting scheme that uses more than one population

[29] As one district court explained:

> State districts drawn strictly on the basis of population would clearly be constitutional, Reynolds v. Sims, 377 U.S. 533, 567 (1964), in spite of the fact that concentrations of non-voting residents in a few districts (such as where prisons or orphanages are located) would make the ballots of voters in those districts more "valuable" than voters' ballots in other districts.

Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564, 577 n.16 (D.D.C. 1980). Indeed, if the state chooses to exclude some persons on the basis of citizenship, then it must also exclude other groups of ineligible voters such as residents who vote in other states, military personnel who vote in other states and prisoners.

[30] As the Ninth Circuit Court of Appeals has recognized, "The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'" Garza v. County of Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991), citing Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

base would necessarily produce disparately populated districts.

Even if CVAP were, theoretically, an appropriate methodological base, the state's evidence in the court below was fatally flawed. As Judge Vinson's concurring opinion explained:

> The defendants have attempted to show that it is the citizen Hispanic voting age population that is determinative. That Hispanic citizenship data is not available, however. Despite the lack of available data, the defendants presented estimates of Hispanic citizenship and attempted to apply them to the individual districts. Those estimates are unreliable. For example, William De Grove's analysis was based on a somewhat unorthodox regression analysis methodology that gave a range of non-citizenship rates of 9.5% for precincts with no Hispanics to 55% for precincts with 100% Hispanic voters. (Acknowledging, of course, that there is no such precinct.) He recognized that the error in that analysis was greatest at the extremes, i.e., at the 9.5% and 55% intercepts. Nevertheless, he used the 55% as the basis of all his citizenship calculations. Plainly, his estimated Hispanic citizenship ratios for the eleven districts must be viewed with low confidence and with a large range of error.

A better gauge of eligible voters within a district is the analysis of the last election results. Those statistics established that Hispanics would be able to elect His-

> panic candidates of choice in all eleven districts proposed by plaintiffs, and those statistics automatically account for voter citizenship, registration, and turn out. Thus, in the absence of any better data, the plaintiffs' evidence is sufficient.

App. 90-91. This finding that the House Appellants had failed in the proof of the very bases of their argument here is binding on appeal.

Adopting the position now advanced by the House Appellants would also result in a logical and legal anomaly. The only means of achieving districts with markedly high percentages of Hispanic citizens -- such as the ones House Appellants suggest -- while maintaining the constitutionally required equal population of all districts, would be to exclude Hispanic non-citizens from such districts. The Hispanic non-citizens thereby excluded would necessarily be placed into non-Hispanic districts. Under this approach, the resulting Hispanic-controlled districts would either be held to a standard requiring a high citizenship percentage and the non-Hispanic districts would be held to no citizenship standard, or would be impermissibly disparate in population. As explained above, in districts composed of equal numbers of all persons, packing of non-voters into majority districts would serve to reduce the number of voters needed to control those districts and would debase the value of the high citizenship districts accordingly.[31]

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[31] Two hypothetical districts illustrate this point:

District	Citizen Pop.	Non-Citizen Pop.	Total
A	75,000	25,000	100,000
B	100,000	0	100,000

(continued...)

Moreover, the opportunity for Hispanic non-citizens residing in predominately Anglo or African-American districts to be represented by Hispanic legislators would be limited or destroyed under the state's plan, as opposed to being preserved in the court-imposed remedy.

Such a result would violate the Fourteenth Amendment. Although non-citizens cannot vote, they are nevertheless entitled to participate in other aspects of the political process. "Non-citizens are entitled to various federal and local benefits . . . . As such, they have a right to petition their government for services and to influence how their tax dollars are spent." Garza v. County of Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991). As early as 1886, this Court held that aliens are "persons" within the meaning of the Fourteenth Amendment and are thus protected from discriminatory state action by the Equal Protection Clause. Yick Wo v. Hopkins, 118 U.S. 356 (1886). That holding has been reaffirmed many times since and is no longer open to dispute. See, e.g., In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). This Court should not recognize in this case a method of apportionment that would inexorably lead to disparate treatment of non-citizens.

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[31](...continued)

In this situation, if all citizens can vote, 37,501 voters can control the outcome of elections in District A. By contrast, 50,001 voters would be the controlling majority in District B. The ballots of voters in District A would thus be more "valuable" than those in District B. While Reynolds and its progeny, Klutznick, teach that this result is constitutional when applied uniformly, it is not constitutional when applied discriminatorily, as in this case.

2. The Court Below Correctly Measured Vote Dilution.

The De Grandy Appellees attacked the Dade County area districts in the House plan as violative of Section 2, alleging:

> Hispanic voters are packed in Districts 110 (82.1%), 111 (75.7%), and 114 (77.5%) and [the state's plan] further submerges Hispanic voters in black minority districts, specifically, District 103 (62% black, 27.8% Hispanic), District 109 (63.0% black, 34.5% Hispanic), and District 118 (34.5% black, 27.1% Hispanic). Less egregious examples of packing, but still having the same dilutionary effect, are District 104 (57.8% black, 16.1% Hispanic), Anglo District 105 (19.2% Hispanic), Anglo District 106 (32.3% Hispanic), District 108 (66.2% black, 16.0% Hispanic). SJR 2-G appears to purposefully pack, fracture and submerge the Hispanic population deliberately to dilute Hispanic voting strength;
>
> Nine Hispanic-American majority districts were created in SJR 2-G; however, other plans submitted to the Legislature show that eleven majority-Hispanic-American seats can be created in the Dade County area. This dilution of Hispanic voting strength is accomplished by the aforementioned packing, fracturing, and submergence with the intent and purpose of protecting white incumbents . . . .

App. 25-26.

The lower court evaluated these allegations with a careful adherence to the analytical framework established by Gingles. The district court considered the three "preconditions" to measure impairment of minority voters' ability to elect representatives of their choice and also assessed the objective factors listed in the Senate Report accompanying the 1982 amendments to Section 2.[32]

With regard to the first Gingles precondition (sufficiently large and geographically compact), the court below noted that voting age population -- not total population -- is the best measure of opportunity within a district to elect candidates of choice. App. 37. Further, the court noted that a "supermajority" of voting age population is necessary to account for the presumably larger number of non-citizens within the minority population as well as the lower levels of voting age persons, voter registration and voter turnout. App. 38.

In this regard, in contrast to the contention of the House Appellants, the lower court did not ignore citizenship levels or blindly follow the so-called "65% rule" to determine the appropriate supermajority needed to satisfy the "sufficiently large" requirement.[33] Based upon Dr.

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[32] See n.21, supra, and accompanying text.

[33] The district court's opinion explained the origin and use of the so-called 65 percent rule.

> The 65 percent rule states that "barring exceptional circumstances, a district should contain a black [or Hispanic] population of at least 65 per cent (or a voting age population of at least 60 percent) to provide blacks [or Hispanics] with an opportunity to elect a candidate of their choice. . . ." The origin of this rule has been traced to the United States Supreme

(continued...)

Lichtman's expert analysis that "no candidate of choice of the Hispanic [community] . . . has been elected in districts below a 59 percent Hispanic [voting age population] level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates," App. 44, the district court reasoned:

> Specifically, the 65 percent rule is premised on the fact that many Hispanics are non-citizens and have lower voter registration and turnouts. If this were not the case, there would be no reason to create districts containing more than 50.1% Hispanic VAP. No one disagrees that because of the lower citizenship and registration/turnout rates, Hispanic districts must contain a super-majority of Hispanic VAP. As previously stated, the 65 percent rule was "arbitrarily" created to account for these problems. Thus, this court must either (1) accept or modify the 65 percent rule or (2) formulate its own methodology for estimating the number of non-citizens reflected in the Hispanic VAP for the various districts. Because each of the districts contains a 60% Hispanic VAP and, therefore, "satisfies" the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district.

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[33](...continued)
Court case of United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 97 S. Ct. 996 (1977) and has been subsequently addressed in Ketchum and Neal v. Coleburn, 689 F. Supp. 1426 (E.D. Va. 1988).

App. 39.

App. 48-49 n.29. Accordingly, the House Appellants are incorrect in asserting that the court's findings were clearly erroneous.

The House Appellants cite Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989), and McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989), in support of the proposition that "the voting strength of the plaintiff must be assessed on the basis of its citizenship levels." House Appellants' Brief at 39. Neither Romero nor McNeil offer authority for narrowly restricting the threshold examination of minority voting potential to minority citizens only. As noted in both Romero and McNeil, the purpose of the initial Gingles requirement is to determine whether the minority group has the potential to elect a candidate of its choice in a single-member district. It was in this context that the lower court here used voting age population and election statistics that took into account citizenship levels.

II. THE REMEDIAL PROCEDURE FOLLOWED BY THE DISTRICT COURT WAS CONSISTENT WITH THE EQUITABLE STANDARDS ESTABLISHED BY THIS COURT.

After finding a Section 2 violation, the court below followed this Court's remedial procedure for reapportionment of the state House. The remedial duty a court faces upon making a finding of Section 2 liability is, foremost, to "exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 208. In fashioning its remedy, the court "has not

merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). A court cannot "authorize an element of an election proposal that will not with certitude completely remedy the Section 2 violation." Dillard v. Crenshaw County, 831 F.2d 246, 252 (11th Cir. 1987) (emphasis in original).

The appropriate standard for court remedial action requires courts to defer to state legislatures in redrawing plans, where practical. Wise v. Lipscomb, 437 U.S. 535, 540 (1978). When, however, "those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a plan pending later legislative action." Id. at 540.

In the instant case, the legislature was manifestly unable to pass a reapportionment plan during its regular session. The reapportionment plan passed in the special session was approved by the state Senate by a margin of only one vote, an event which foreshadows the legislature's later unwillingness to draw additional districting plans. Indeed, both the House Appellants and the Senate appellees wrote to the Florida Supreme Court indicating their unwillingness to consider legislative apportionment further. App. 109.[34] By the time the lower court made its finding of liability, filing for the 1992 elections was less than two weeks away. Notwithstanding the late hour, the court nevertheless granted the House Appellants an opportunity to devise remedial plans during the remedial phase of the trial. The House Appellants' response was to submit two

[34] The pertinent part of the letter is quoted at p. 12, supra.

remedial plans that the district court specifically determined did not fully remedy the violations it had found.[35] App. 84-85.

An important colloquy took place between Judge Stafford and Mr. Wallace, Chairman of the Reapportionment Committee of the Florida House of Representatives, when the House Appellants offered their second remedial plan:

> JUDGE STAFFORD: We have been in here slugging it out for three days on that point and then you come in at 6:30 and tell us you have one with eleven seats and enhance the black seats; is that correct?
>
> MR. WALLACE: Well, Your Honor, we did feel an obligation to prepare for the remedial phase of this litigation. And that plan was prepared in anticipation of that.
>
> JUDGE STAFFORD: So, it is doable; is that what you're saying, Mr. Wallace?
>
> MR. WALLACE: Within the parameters --
>
> MR. PETERS: But we need --
>
> JUDGE STAFFORD: You asked for him to speak. I'm talking to him.

[35] The district court concluded that, because the House Appellants' plans did not sufficiently take new Hispanic arrivals into account, they "[did] not give Hispanics a reasonable opportunity to elect candidates of their choice." App. 85.

MR. WALLACE: I'm happy to answer the question.

JUDGE STAFFORD: You are the Chairman of this committee and had that responsibility for how many months now?

MR. WALLACE: Your Honor, I have been Chairman of this committee since just after the 1988 election.

JUDGE STAFFORD: All right. So, you tell us now: You are representing to this Court that you can create in Dade County eleven Hispanic seats and increase the electability of black candidates in Dade County within the confines of the Joint Resolution without affecting any other district? Is that your representation before this Court?

MR. WALLACE: Your Honor, that plan contains eleven Hispanic districts. The lowest voting age population in the Hispanic districts is 61 percent. It contains four black districts 55 percent black voting age population and higher. I'm not really prepared to testify about the specifics of the districts. And I will tell you, Your Honor, that that plan was, you know, that plan has just been completed. It's not like it's been sitting around here on the doorstep somewhere.

JUDGE STAFFORD: No, I understand that. But it is now created?

MR. WALLACE: Yes, sir. . . .

Tr. VIII, 112-13. Thus, by demonstrating that one or two additional Hispanic districts could be created, the proffered House plans effectively contradict the House Appellants' current contention that only nine effective districts can be created.

In sharp contrast to the total absence of remedial considerations with respect to the state Senate, the House Appellants were afforded a remedy phase. Having offered two proposed remedies that did not fully cure the Section 2 violations found by the district court, the House Appellants now merely seek another opportunity to litigate the remedy phase.

III. THE ABSTENTION DOCTRINE HAS NO APPLICATION WHERE PLAINTIFFS SEEK REDRESS FOR VIOLATION OF A FEDERAL STATUTE IN FEDERAL COURT AND NO STATE COURT HAS EVER ADJUDICATED THE CLAIM.

Throughout this case, both prior to the judgment of the district court[36] and in this appeal, the House Appellants have persistently -- and incorrectly -- asserted that the De Grandy Appellees were not even entitled to a federal court hearing of their Section 2 claims. They maintain that "[t]hose plaintiffs had previously raised, and had received an adjudication of, identical Section 2 claims in the Florida Supreme Court." House Appellants' Brief at 20. Because the Florida Supreme Court explicitly declined to entertain or adjudicate Section 2 issues in connection with its facial review of the legislative reapportionment plan, no such issue of res judicata arises.

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[36] See House Appellants' Application for Stay filed June 26, 1992.

In declaring SJR 2-G "facially valid," the Florida Supreme Court stated it did not, and could not, adjudicate whether the plan complied with Section 2:

> [I]t is impossible for us to conduct a complete factual analysis contemplated by the Voting Rights Act, as interpreted in Thornburg v. Gingles, within the time constraints of Article III, Section 16(c). . . .
>
> Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation. . .

In re Senate Joint Resolution 2G, 597 So. 2d 276, 282 (Fla. 1992). Because of the limitations of the Florida Supreme Court's review and the "unavailability of specific factual findings," the court's decision was entered without prejudice to a later Section 2 challenge. 597 So. 2d at 285. Because the Florida Supreme Court did not adjudicate any Section 2 claims, the federal district court does not have to give any, let alone full, faith and credit to a judgment that did not decide the issues before it. Haring v. Prosise, 462 U.S. 306, 313 (1983).

The House Appellants also stray from the facts in stating that the De Grandy Appellees were given "a full and fair opportunity to litigate" the Section 2 claims and that the state court received "evidentiary submissions." House Appellants' Brief 45. The opponents of SJR 2-G were strictly limited to the presentation of a single illustrative plan, a written brief and a truncated oral argument. The court did not permit one word of sworn testimony or a single question on cross-examination.

For the same reason, abstention under the Rooker-Feldman doctrine does not apply. The district court below was not reviewing an adjudication of Section 2 claims, but, rather, was deciding those issues for the first time. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

In fact, throughout the course of the federal proceedings, the district court afforded maximum deference to the state reapportionment process.[37] It was only after the State of Florida had a legally enforceable House plan, and Section 2 challenges were interposed against it, that the district court decided to exercise jurisdiction. At that point, there were no proceedings in state court concerning legislative redistricting, and the sole issue remaining was

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[37] The House Appellants' accusation that the federal court failed to respect state authority over redistricting is totally unsupported by the record. Directly to the contrary, since the filing of the De Grandy Appellees' original complaint in January 1992, the district court has deferred to all state proceedings.

When the De Grandy Appellees initiated this action, the district court dismissed the complaint, ruling that the state legislature should have more time to pass an apportionment plan. Even when the district court reluctantly accepted jurisdiction in March, after the Florida legislature failed to pass a plan, the court was quick to point out that it was not enjoining any state proceeding. Thereafter, when the legislature passed a joint resolution of apportionment on April 10, 1992, the district court bifurcated its trial schedule, setting the trial on congressional redistricting first and delaying the trial on state redistricting. When the Florida Supreme Court entered its determination that the joint resolution was facially valid, the federal court, on its own motion, stayed all proceedings concerning state legislative redistricting. Finally, despite numerous requests by the De Grandy Appellees to lift the self-imposed stay and set trial during the preclearance review process, the federal court refused, deferring all action until the Department of Justice's preclearance decision. App. 14.

whether an existing, legally enforceable plan violated Section 2 of the Voting Rights Act. That federal issue was, for the first time, pending in a federal court and, at that point, the federal district court had not only the right, but the obligation, to entertain the De Grandy Appellees' federal claims.

As this Court stated in New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 373 (1989):

> It is true that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future or, as in the present circumstances, even a pending state-court action. But there is no doctrine that the availability or even the pendency of a state judicial proceeding excludes the federal courts. Viewed as it should be, as no more than a state-court challenge to completed legislative action, the Louisiana suit comes within none of the exceptions that Younger and later cases have established.

If the Court were to adopt the theory put forward by the House Appellants under these facts -- that the mere presence of an alternative forum warrants abstention -- then a federal court would never be able to hear cases involving civil rights protected under the United States Constitution. In sum, the record in this case reflects that, even though it was not required to do so, at every stage of the proceedings, the federal court deferred to the state proceedings and stayed its hand hoping for a state resolution of proven violations of federal law.

The House Appellants' claim that the decision in California Democratic Congressional Delegation v. Eu, 790 F. Supp. 925 (N.D. Cal. 1992), is "identical" to this case,

House Appellants' Brief at 46[38]; however, the circumstances of that case quite clearly distinguish it from the case at bar. The California plaintiffs had filed their case with the California Supreme Court as permitted by the state constitution. Long before a case was filed in federal court, the California Supreme Court, through a special master, heard extensive evidence on the totality of the circumstances and had drawn a plan that was designed to meet any possible Voting Rights Act challenge. Wilson v. Eu, 823 P.2d 545 (Cal. 1992). By the time that the federal district court declined jurisdiction, the California Supreme Court had already produced maps and reached a final adjudication of the Voting Rights Act issue. If the district court there had exercised jurisdiction, it would have been in the position of an appellate court in violation of the Rooker-Feldman doctrine. No such circumstances existed here, because the Florida Supreme Court had expressly declined to adjudicate the Section 2 issues.

Finally, federal courts do not abstain or defer to a state court in an action that involves a person asserting the rights under the Voting Rights Act asserted here. 42 U.S.C. § 1973j(f) ("The district court . . . shall exercise [jurisdiction over Voting Rights Act cases] without regard to whether a person asserting rights under [the Act] shall have exhausted any administrative or other remedies that may be provided by law.")

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[38] The California case was a traditional "legislative deadlock" case accepted under the California Supreme Court's original jurisdiction in such circumstances. The instant case was a mandatory, but facial, review required before the redistricting scheme passed by the Florida legislature could take effect. See Fla. Const. art. III § 16(c). Moreover, in California Democratic Congressional Delegation v. Eu, the state case was filed first.

CONCLUSION

For the foregoing reasons, the judgment of the lower court with respect to the Florida House of Representatives should be affirmed in all respects.

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